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In the

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF DISABLED AMERICAN VETERANS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF JURISDICTIONAL STATEMENT OF THE UNITED STATES

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INTERESTS OF *AMICI CURIAE*

The Disabled American Veterans ("DAV") and the Paralyzed Veterans of America ("PVA") are nonprofit veterans' organizations qualified for income tax exemption as described

in Section 501(c)(4) of the Internal Revenue Code of 1954, as amended (26 U.S.C.), contributions to which are tax-deductible under Section 170(c)(3) of the Code. *See* IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981).[1] Both DAV and PVA are chartered by Acts of Congress (36 U.S.C. §§ 90a *et seq.* and 1151 *et seq.*, respectively), and each has a program in which it attempts to influence legislation in furtherance of its statutory purposes. The great preponderance of the annual revenue of each organization is derived from tax-deductible contributions. In DAV's case, a substantial portion of this revenue is devoted to operating the largest national service program of any veterans' organization in the United States, assisting in this respect the more than 700,000 members of DAV (each of whom must possess a service-connected disability recognized under federal law), their families and other veterans through more than 2,500 chapters nationwide. In PVA's case, a substantial portion of its revenue is devoted to operation of a service program uniquely devoted to assisting the more than 11,000 members of PVA (each of whom must be a veteran who suffers from spinal-cord injury or disease) through approximately thirty-five chapters located throughout the states and territories.

Under the decision of the Court of Appeals in this case, *amici* might have to forego their right to receive tax-deductible contributions so essential to the important functions they

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[1] The Court of Appeals stated that Section 501(c)(4) organizations could not receive tax-deductible contributions. Jurisdictional Statement of the United States ("USJS"), Appendix ("App.") at 19a and 23a. The lower court's generalization is incorrect concerning veterans' organizations qualified for income tax exemption thereunder, as indicated by the authorities cited in text. Although the United States repeated the court's generalization about Section 501(c)(4), USJS at 4 n.3, it does not mean thereby to contend that the generalization covers veterans' organizations. *See, e.g.*, USJS at 22 n.14. Undersigned counsel has been assured by the Solicitor General that this is the case.

uniquely perform throughout the country for their special memberships and the nation's thirty million veterans as a whole, in order to continue to enjoy their unrestricted right to perform the additional function of promoting legislative programs of benefit to veterans. Having been denied leave to intervene in this case as appellants, *see* 50 U.S.L.W. 3998 (U.S. June 22, 1982), DAV and PVA now seek to express their views to this Court as *amici curiae*.

SUMMARY OF ARGUMENT

Amici present three arguments not before heard herein to support the noting of probable jurisdiction. First and second, the Court of Appeals' remedial decision both exceeded its power under Article III of the Constitution by redirecting the litigation over the parties' objections, and denied *amici* due process by jeopardizing their rights without affording them notice and an opportunity to be heard on the merits. Third, *amici* present important reasons for making applicable and confining the lobbying restriction at issue to charitable organizations, which reasons *amici* have not before been able to offer and which fully support the statutory classification thereby created.

ARGUMENT

I. The Court of Appeals Lacked Judicial Power and Denied *Amici* Due Process When It Authorized and Urged the District Court to Rewrite Unchallenged Statutes Affecting Nonparties.

The Court of Appeals committed three errors of constitutional dimension in deciding this case, not just one as suggested by the single question presented in the Jurisdictional Statement of the United States ("USJS") at I. *Amici* will thus first

address the two unexplored errors related to remedy because they are "fairly included" in the question presented by the USJS. Sup. Ct. Rule 15.1(a). *Amici* will then supplement the reasons offered by the United States in support of noting probable jurisdiction to review the holding of the Court of Appeals that the Internal Revenue Code's different treatment of lobbying by charitable and veterans' organizations violates the principle of equal protection found in the Fifth Amendment.

After ruling unconstitutional the lobbying restriction in Section 501(c)(3), the Court of Appeals decided that it was both possible and preferable to remedy that violation by extending the restriction to Sections 501(c)(4) and 501(c)(19) (which govern the tax exemption of veterans' organizations),[2] rather than removing the restriction from Section 501(c)(3) (which governs the tax exemption of charities like appellee). Appendix to USJS ("USJS App.") at 75a-78a. It therefore remanded the case to the District Court with the strong suggestion that extending rather than eliminating the restriction was the more appropriate remedy, despite the stated opposition of the prevailing party to this approach, USJS App. at 76a and n.53, and despite the fact that it would adversely affect veterans' organizations which had not theretofore participated in the litigation.[3]

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[2] To achieve this result, a lobbying restriction specifically limited to veterans' organizations would have to be judicially engrafted onto Section 501(c)(4). The lobbying freedom enjoyed by nonveterans' groups qualified under that provision is not implicated in this case because contributions to such groups are, unlike contributions to veterans' organizations, not tax-deductible. *See* note 1, *supra*. No such limitation would be required to engraft the lobbying restriction onto Section 501(c)(19) since that provision applies only to veterans' organizations.

[3] As recited in the affidavits of *amici* submitted to this Court in their unsuccessful effort to intervene herein after judgment as appellants, *see* 50 U.S.L.W. 3998 (U.S. June 22, 1982), and reproduced in the Appendix ("App.") hereto, neither DAV nor PVA was aware of the pendency of this litigation until after announcement of the Court of Appeals decision en banc. App. A and B, *infra*, at 3a and 5a-6a, respectively.

Amici submit that this remedial decision, *inter alia*, both violates the requirements of Article III of the Constitution, which limits the exercise of federal judicial power to "cases" and "controversies," and denies fundamental fairness to nonparties by exposing them to a judicially imposed burden without their ever having had notice or an opportunity to be heard on the merits of the case.[4]

Considering first the Article III infirmity, what plaintiff sought was a declaration that it was eligible for Section 501(c)(3) status despite its intention to engage in lobbying.[5] Plaintiff did not seek to have various lobbying restrictions engrafted onto Sections 501(c)(4) and 501(c)(19). *See* note 2, *supra*. It was the Court of Appeals which, by its mandate to the District Court, proposed and authorized the remedy of rewriting unchallenged statutes. Even if such a remedy would have been proper if plaintiff itself had sought and had standing to seek it, it is certainly not a proper remedy where the only "party" which favors it is the court itself.[6] The function of a court is to determine whether a party is entitled to the relief it seeks. It is not a court's function, *sua sponte*, to override the plaintiff's judgment of its own best interests and shift

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[4] The United States has already indicated that the Court of Appeals' "extraordinary disposition calls for review" because the appellate court's direction to the trial court "cannot be reconciled with the separation of powers among the three branches of government that is at the heart of our constitutional system." USJS at 11.

[5] For convenience, appellee's complaint is contained at App. C. Appellee's demand for relief appears at 10a-11a.

[6] In none of the five cases cited by the Court of Appeals in support of its remedial holding, nor in any case found by counsel, has a federal court refused to give the party whose equal protection challenge prevailed the benefit (or exclusion from burden) sought, in favor of extending to nonparties the burden (or exclusion from benefit) challenged. *See* USJS App. at 75a-76a; *Orr* v. *Orr*, 440 U.S. 268 (1979); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Moritz* v. *C.I.R.*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973); *Women's Health Services, Inc.* v. *Maher*, 482 F. Supp. 725 (D. Conn.), *vacated on other grounds*, 636 F.2d 23 (2d Cir. 1980); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973).

the focus of the litigation to statutory provisions which the court believes the plaintiff should have attacked.

For example, in *Williams* v. *Zbaraz*, 448 U.S. 358 (1980), the plaintiff had challenged the constitutionality of a state statute concerning abortion funding, but the Court of Appeals there directed the District Court to rule on the constitutionality of a related federal statute (the Hyde Amendment). This Court held that the "constitutional validity of the Hyde Amendment was interjected as an issue only by the erroneous mandate of the Court of Appeals," and declared that there was no jurisdiction to deal with the validity of the federal statute because "the Court of Appeals could not create a case or controversy where none otherwise existed." *Id.* at 367. *Cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 319-320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) (reversing trial court decision directing special master to inquire into matters not complained of by plaintiff, for being outside "judicial power [which] is limited to deciding controversies"). Similarly, the necessary but limited implication of Sections 501(c)(4) and 501(c)(19) for purposes of an equal protection analysis cannot expose those provisions, and those who benefit from them, to adverse treatment unless a party with standing to do so seeks such treatment.

Courts have expressed like concerns in construing the scope of Rule 54(c), Fed. R. Civ. P., which provides in part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Failure to demand any particular relief is thus no barrier to its award under the rule, but two principles are followed in limiting the extent to which the relief granted by federal courts can go beyond the demand. "The first is that a remedy desired by *none* of the parties should not be forced on them. [Citing cases.]" *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (emphasis in original). No party herein desired or, for all that appears, could hope to benefit by

the remedial option created by the Court of Appeals. *See* USJS at 11; USJS App. at 76a and n.53. Thus, that option was foreclosed from consideration either by the Court of Appeals or the District Court on remand, exceeding as it did the boundaries of judicial authority.

The second limiting principle raises the other unexplored constitutional defect in the Court of Appeals' remedial decision. The principle is that Rule 54(c) does not authorize the imposition of relief not sought if "the failure to ask for particular relief substantially prejudiced the opposing party." *Robinson*, 444 F.2d at 803 (citing *Rental Development Corp. of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962)). *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (relief not proper if the "other party" were "improperly and substantially prejudiced"). *A fortiori*, granting unrequested relief is precluded if the failure to request it substantially prejudices a nonparty.

The prejudice to *amici* created by the surprising decision of the Court of Appeals is manifest. Since *amici's* tax status was never the target of appellee's lawsuit, *amici* were never notified by any court or party that their right to enjoy lobbying freedom without governmental restriction or regulation was in jeopardy, *see* note 3 *supra*, and they were never given an opportunity to be heard on the merits.[7] Then, following its redirection of the litigation, the Court of Appeals thought it sufficient merely to "invit[e] veterans' organizations to participate in framing relief," USJS at 77a, and compounded its error by refusing to let *amici* intervene after judgment to appeal its decision. *See* App. D, *infra*, at 12a-13a. It thereby

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[7] Among the arguments *amici* might have made on the merits that are now foreclosed to them by virtue of the proceedings below is that appellee is precluded by res judicata from relitigating this case in light of the defeat of its predecessor organization on similar issues in *Taxation with Representation* v. *United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979) — an issue which the Court of Appeals noted the appellants did not choose to argue. USJS App. at 13a n.1.

denied *amici* that fundamental fairness required by the Constitution before such a valuable right may be taken. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The requirements of due process and the absence of judicial power therefore constitutionally prevented the Court of Appeals from empowering the District Court to rewrite statutes not challenged and adversely affect nonparties thereby.[8] Its proper course, assuming plaintiff should have prevailed, was to declare the lobbying restriction in Section 501(c)(3) invalid and leave it to Congress to decide how, if at all, the statutory scheme should be amended. *Cf. Northern Pipeline Construction Co.* v. *Marathon Pipeline Construction Co.*, 50 U.S.L.W. 4892, 4902 (U.S. June 29, 1982) (Nos. 81-150 and 81-546) (judgment stayed to afford Congress an opportunity to amend statute held unconstitutional in part).

Briefs on the merits of an appeal in this Court may not raise questions not presented in the jurisdictional statement. Sup. Ct. R. 34.1(a). As indicated earlier, *supra* p. 4, *amici* believe that the important remedial issues raised by the Court of Appeals and requiring resolution if its decision on the merits is affirmed are "fairly included" in the question presented, and therefore may be briefed by the parties and considered by this Court should probable jurisdiction be noted.[9] *See, e.g., Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980).

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[8] The Court of Appeals also ignored the relevant statutory barrier to its assertion of remedial power. The separability clause of the Internal Revenue Code provides: "If any provision of this title . . . is held invalid, the remainder of the title . . . shall not be affected thereby." 26 U.S.C. § 7852(a). Having found the lobbying restriction of Section 501(c)(3) to be invalid, the court was thus constrained from seeking to affect Sections 501(c)(4) and 501(c)(19), which appear elsewhere in Title 26. Thus, even if the lower court's ruling does not run directly afoul of the Constitution, the serious questions it raises in constitutional and other respects make its exercise of discretion in this regard clearly erroneous.

[9] That the remedial issue will be preserved for the Court's decision seems also clear by the scope of jurisdiction under 28 U.S.C. § 1252, which brings

Further, *amici* assume that the United States' objection to the Court of Appeals' remand order on grounds of separation of powers, *see* note 4 *supra*, reveals the Government's view that at least the question of the lower court's power, if not the due process issue as well, is fairly included in the question it presented. Therefore, *amici* expect that the Government will address that issue in its merits brief, if one is called for. However, out of an abundance of caution, because of the importance of the issues, and in order to insure a full presentation of the difficulties which the decision of the Court of Appeals portends, *amici* would suggest that if there is doubt about preservation or elaboration of the remedial issues at the merits stage, this Court could direct the parties to address the propriety of the lower court's extraordinary disposition of this case if and when it orders that probable jurisdiction be noted.

II. Congress's Interests in Curbing Charities' Potential for Lobbying Abuses and Obtaining Information from Veterans' Organizations Fully Justify Its Different Tax Treatment of the Two Types of Organizations.

In its Jurisdictional Statement, the United States argues that the Court of Appeals was wrong to apply heightened scrutiny to the statutory classification at issue, to limit its inquiry only to an examination of those purposes to be served by the classification which were actually expressed in the legislative record,

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before the Court "the whole case," *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 367-368, and by the nature of the "plain error" committed by the Court of Appeals in this respect. Sup. Ct. R. 34.1(a). Moreover, because the lower courts' remedial decision could deny appellee the fruits of its victory, appellee may well raise the issue itself in a cross-appeal. But if neither appellants nor appellee is deemed to raise the remedial issue at the jurisdictional stage, and there is no other adequate authority to carry it into the merits stage, *amici* submit that their having presented the issue herein should suffice to preserve it. *Cf. Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975).

and to conclude that "absolutely no governmental interest whatsoever" (USJS App. at 66a) exists to support the statutory distinction.

Amici agree with the United States in all these respects, and provide below additional support for the Government's position. Of particular concern to *amici* is that they be given their first and perhaps only opportunity to be heard on a constitutional question directly affecting their interests and those of the nation's thirty million veterans. Their concern is underscored by the Court of Appeals' observation that, on the vital question of identifying governmental interests sufficient to justify the different tax treatment accorded to veterans' organizations, the "government made no attempt in the district court to present affidavits or other evidentiary materials." USJS App. at 49a.

Regarding the appropriate standard of review, the only possible justification for applying heightened scrutiny is the fact that lobbying activities involve the exercise of First Amendment rights. But that involvement alone is not enough to trigger more rigorous examination of a statutory classification. As this Court has held, "equal protection analysis requires strict scrutiny only when the classification *impermissibly* interferes with the exercise of a fundamental right." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976) (emphasis added, footnote omitted). Thus, the degree of impact determines the mode of review, and mere rationality is the test unless there has been an impermissible interference with the exercise of such rights. However, the Court of Appeals did not pursue a heightened scrutiny because the lobbying restriction at issue "impermissibly interferes" with appellee's First Amendment rights. Indeed, the Court of Appeals held that appellee "has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights." USJS App. at 35a. Instead, the lower court chose this course because Section 501(c)(3)'s "*indirect* burdens on First Amendment expression" do not fall "equally on all." USJS App. at 40a (emphasis added).

In this respect the Court of Appeals was "guided by *Buckley* v. *Valeo*, 424 U.S. 1 (1976)" (USJS App. at 41a), but inappropriately so. In *Buckley*, the speech rights of candidates subsidized through unequal federal campaign financing were at the core of the political process. Lobbying activities subsidized through allegedly unequal tax benefits are not similarly central to the functioning of charitable organizations. Moreover, unequal speech subsidies substantially affect the comparative strength of political candidates, who must compete directly with one another. Here there is no showing of any such direct competition between charities and veterans' organizations. Thus, the increased sensitivity to unequal speech subsidies in *Buckley* is not warranted here because the consequences of the alleged inequality are substantially less severe.

The lower court should have been guided instead by cases like *Johnson* v. *Robison*, 415 U.S. 361 (1974), which involved an equal protection claim by a conscientious objector who asserted that his exercise of First Amendment religious freedoms was penalized by his consequent ineligibility for veterans' benefits.

> [S]ince we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.

Id. at 375 n.14. The principle enunciated in *Robison* controls here: where fundamental rights are not directly infringed, heightened scrutiny is simply not appropriate. Even if heightened scrutiny were appropriate, an examination of the important governmental interests served by the classification at issue convincingly demonstrates that Congress had ample justification for making it.[10] In 1934, Congress first amended the In-

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[10] As the Government pointed out, the lower court erred in restricting its examination of legislative purposes to those explicitly stated by the

ternal Revenue Code to include what is now the challenged lobbying restriction in Section 501(c)(3). In doing so, Congress's purpose was clear: to prevent abuses it detected in the lobbying activities of certain exempt organizations. The Senate Finance Committee Report of the amendment contained the following language:

> This change made by your committee prohibits the deduction for contributions made to *an* organization a substantial part of whose activities is participation in partisan politics or in carrying on propaganda, or otherwise attempting to influence legislation.

S. Rep. No. 558, 73d Cong. 2d Sess. 26 (1934) (emphasis added). However, Senator Harrison stated in subsequent floor debate:

> [T]here are *certain* organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment to stop that, so that is why we have put this amendment in the bill.

78 Cong. Rec. 5959 (1934) (emphasis added). The change from "an" organization to "certain" organizations was carried forward into the Conference Committee report:

> This amendment prohibits any deduction for contributions made to *certain* organizations, a substantial part of

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legislature. USJS at 20 n.13. As this Court recently observed, a court may examine "all the considerations presented to [the legislature], *and those of which we may take judicial notice.*" *Western & S. Life Ins. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 674 (1981) (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (emphasis added). Even in strict scrutiny cases courts may inquire beyond the legislative record. *See, e.g., Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968) ("we must consider the facts and circumstances behind the law [and] the interests which the State claims to be protecting").

> the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting, to influence legislation . . . .

H.R. Rep. No. 1385, 73d Cong., 2d Sess. 17 (1934) (emphasis added).

It is thus evident that Congress intentionally narrowed its focus to those organizations within the universe of all tax-exempt organizations commonly referred to as charities and now described in Section 501(c)(3). This is not at all surprising. Today, charities outnumber veterans' organizations by more than ten to one and receive nearly 1,500 times more revenue. USJS App. at 73a. It is no wonder that the abusive potential of charities was a dominant legislative concern.[11]

Not only did Congress plainly intend to exclude veterans' organizations from the lobbying restriction it enacted in 1934, but it also has declined, during the succeeding forty-eight years, to extend the lobbying restriction to them. If the original absence of such a restriction on veterans' organizations were truly the result, the Court of Appeals suggests, of congressional "lack of attention and consistency" (USJS App. at 56a), then surely the oversight would not have survived nearly five decades.[12]

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[11] Congressional concern about the potential for lobbying abuse by specific types of tax-exempt organizations continues to the present. For example, in the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 496 (1970), Congress responded, *inter alia*, to what it perceived as the potential for lobbying and other similar abuses by one group of the "certain organizations," namely the private foundations, by forbidding them from engaging in any legislative or political activities. 26 U.S.C. § 4945.

[12] If Congress had wanted to extend the lobbying restriction to veterans' organizations, an opportune time to have done so would have been in 1972 when it enacted a new subsection of Section 501(c) that specifically applied to war veterans' organizations. *See* 26 U.S.C. § 501(c)(19). Examination of the legislative history of that amendment, however, indicates that the possibility of extending the lobbying provision was not even mentioned. *See* S. Rep. No. 1082, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 851, 92d Cong., 2d Sess. (1972).

The continued refusal of Congress to extend the lobbying restriction to veterans' organizations is warranted by substantial reasons deriving from their uniqueness. First, veterans' organizations do not present the same potential for lobbying abuse as charities because they are subject to significantly more government regulation than charities. For example, the government determines who is eligible for membership in veterans' organizations. *See, e.g.*, War Veterans' Organizations Regulations, 26 C.F.R. § 1.501(c)(19)-1(b) (1981) (requiring, *e.g.*, that 75 percent of all members must be "war veterans"). Charities, of course, are subject to no such restriction. In *amici's* case, the only requirements for joining DAV and PVA are honorable military service and physical disability, resulting in a wide array of political and other beliefs in memberships otherwise sharing only those two qualifications.

Moreover, the activities of veterans' organizations like *amici* are circumscribed by their Congressional charters. *See, e.g.*, 36 U.S.C. §§ 90c (DAV) and 1153 (PVA) (setting forth the purposes of each organization). Again, charities are not subject to any comparable Congressional control. DAV is also careful to confine the permissible scope of its legislative activities by adopting at each annual convention a "Statement of Policy" which provides, in part, that the organization "will not take action on any resolution that proposes legislation designed to provide benefits for other than wartime, service-connected disability." *See, e.g.*, Sixty-First National Report of the Disabled American Veterans, 1981, H.R. Doc. No. 104, 97th Cong., 1st Sess. 47 (1981).[13]

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[13] Beyond these external and internal limitations on legislative activity, the Congressional charters of both DAV and PVA state that each organization is nonpolitical and may not promote the candidacy of any person seeking public office. 36 U.S.C. §§ 90f (DAV) and 1156 (PVA). Furthermore, DAV and PVA are required by statute to obtain annual audits for submission to the Congress, DAV's by the Comptroller General and PVA's by an independent auditor. 36 U.S.C. § 90c (DAV) and 1166 (PVA).

Both government and self-regulation have thus produced veterans' organizations like *amici* whose legislative activities are concentrated, by membership choice and charter restrictions, on issues principally if not exclusively involving veterans' benefits. As discussed below, it is precisely on such issues that Congress has a proper interest in obtaining the views of veterans' organizations. Congress therefore has no need to impose on veterans' organizations the broad prophylactic of the lobbying restriction it uses to govern charities' potential for lobbying abuse. This is so because Congress has already employed legislative means individually tailored to veterans' groups which accomplish essentially the same end.

Second, veterans' organizations warrant different lobbying treatment because Congress has a legitimate need for information which such groups are ideally situated to provide. The Government and the dissent in the Court of Appeals reviewed the constitutional legitimacy, repeatedly affirmed by this Court, of the special treatment Congress has traditionally afforded the nation's individual veterans. USJS at 19 n.12; USJS App. at 115a-116a. In order to ensure that these special veterans' programs are effective in terms of both substance and implementation, Congress regularly requires information on veterans' needs and how they are being met. Veterans' organizations are uniquely able to supply that information.[14]

DAV and PVA engage in a continuous process of consultation with their members through their more than 2,500 local chapters and through annual conventions at which agenda for the following years are established. It is therefore evident why Congress might consider it vital to solicit the views of

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[14] Of course, this is not to suggest, as the Court of Appeals apparently thought it was, that veterans' organizations are entitled to more freedom of speech than other groups. USJS at 46a-47a. Rather, it is only to observe that since Congress may legitimately provide special assistance to veterans, Congress may also legitimately determine that it wants to obtain the opinions of veterans' organizations to assist it in deciding how and in what form those benefits may most effectively be distributed.

these organizations before determining how funds appropriated for the benefit of their members should be spent. For example, DAV represents more than 700,000 disabled veterans from every American war since the Spanish-American; more than twenty-five percent are Vietnam-era veterans. PVA, with over 11,000 members, represents more than half of all American veterans who suffer from spinal-cord injury or disease.

DAV and PVA are also direct providers of services to veterans and thereby gain special insight into both the importance and effectiveness of these services and the federal programs to which they are in part related. DAV operates thé most extensive National Service Program of all the major veterans' organizations in the United States. The program is staffed by 278 National Service Officers ("NSO's") employed by DAV in sixty-eight cities across the nation. Each NSO is accredited by the Veteran's Administration under 38 U.S.C. § 3402. NSO's provide counselling for veterans and their families concerning the full panoply of government benefits to which the veterans' status and disabilities entitle them. The NSO's, all of whom are extensively trained by DAV, also act as attorneys in fact for veterans who wish them to do so. As such, during the year ending June 30, 1981, DAV Officers helped veterans and their families to secure from the federal government almost one billion dollars in retroactive annual and new monthly benefits.

Beyond these counselling and advocacy functions of its service program, DAV itself provides financial benefits. It maintains an Emergency Relief Fund to assist veterans facing financial emergencies, and a Disaster Fund to aid veterans who have suffered from natural calamities. During the year ending June 30, 1981, DAV dispensed more than $1.3 million to nearly 7,000 veterans and families from these funds. In addition, DAV awarded more than $300,000 in scholarship money to 189 students for the 1980-81 school year.

PVA operates a similar service program that employs fifty full-time service officers in forty-four offices across the United

States. These service officers are recognized nationwide as experts in the complex and little-understood field of catastrophic and multiple disabilities. PVA's service programs account for more than sixty percent of its annual budget and are half again as large as they were only four years ago. In addition, PVA is the largest nongovernmental supporter of spinal-cord injury research. Last year alone, PVA provided approximately $500,000 to this effort. It also operates a nursing scholarship program to provide education to those who help care for catastrophically disabled veterans and seek to return them to society as productive members.

Since Congress and veterans' organizations such as *amici* are committed to so many of the same goals with regard to the nation's veterans, it would be at best illogical for Congress to restrict the opportunity of these organizations to provide it with information important in furthering their common effort. As the Court of Appeals for the Fourth Circuit held in coming to the opposite conclusion of the court below:

> the unique and compelling societal and governmental goals served by [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress.

Taxation With Representation v. *United States*, 585 F.2d 1219, 1225 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

CONCLUSION

Probable jurisdiction should be noted, to correct apparent error, to review a decision of significant national impact, and

to afford representatives of the country's thirty million veterans their only opportunity to be heard on matters of vital interest to them.

Respectfully submitted,

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Appendix A.

United States Court of Appeals for the District of Columbia Circuit

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,

APPELLANT,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,

APPELLEES.

AFFIDAVIT OF NORMAN B. HARTNETT

I, Norman B. Hartnett, being duly sworn, depose and say as follows:

1. I am the National Director of Services for the Disabled American Veterans ("DAV"). In that capacity, I submit this affidavit in support of the Motion of the Disabled American Veterans to Intervene in the case of *Taxation with Representation of Washington v. Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc).

2. In my capacity as National Director of Services for the DAV, I am responsible for the operation of DAV's Washing-

ton, D.C. office. I supervise all of DAV's legislative activities, and I am in charge of the National Service Program. During the course of my work, I regularly become aware of governmental actions and litigation that might affect the operation of DAV.

3. DAV was formed in 1920 by a group of disabled World War I veterans. It was chartered by an Act of Congress on June 17, 1932, and was incorporated in Ohio in 1938.

4. DAV is exempt from federal income taxation under Section 501(c)(4) of the Internal Revenue Code of 1954, as amended, and the deductibility of contributions to it are governed by Section 170 of the Internal Revenue Code. I am attaching as Exhibit A to this affidavit a true copy of a letter, dated June 24, 1942, from the Deputy Commissioner of Internal Revenue to DAV, a copy of which letter is maintained under my custody and control in DAV's files in Washington, D.C., and which determines DAV's tax exemption and tax deductibility. When Section 501(c)(19) was enacted in 1972, DAV did not elect to become qualified thereunder because DAV had no insurance program for its membership from which it derived income.

5. To qualify for membership in DAV, an individual must be an honorably discharged veteran of the United States Armed Forces with a disability incurred in wartime military service or under conditions simulating war. At present, there are a total of approximately 710,000 members of DAV.

6. Among the programs of DAV are a National Legislative Program. Through its National Legislative Program, DAV seeks in a non-partisan way to secure benefits for its membership and for other veterans.

7. The total revenue of DAV for the year ended December 31, 1981, is approximately $31 million. Approximately $25 million of that total is derived from contributions through direct solicitations to the general public.

8. On March 26, 1982, I first learned of the existence of the litigation known as *Taxation With Representation of Washington v. Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc), the litigation in which DAV seeks to intervene.

9. To the best of my knowledge, no one else in DAV knew about the pendency of the *Taxation v. Regan* lawsuit before I learned about the decision.

/s/_____
NORMAN B. HARTNETT

Sworn to and subscribed before me this 20th day of April, 1982.

/s/_____
NOTARY PUBLIC

My Commission Expires:
October 14, 1986

Appendix B.

United States Court of Appeals for the District of Columbia Circuit

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,

APPELLANT,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,

APPELLEES.

AFFIDAVIT OF R. JACK POWELL

I, R. Jack Powell, being duly sworn, depose and say as follows:

1. I am Executive Director of the Paralyzed Veterans of America ("PVA"). In that capacity, I submit this affidavit in support of the motion of the PVA, *et al.*, to intervene in the case of *Taxation With Representation of Washington* v. *Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc).

2. In my capacity as Executive Director of PVA, I am its chief salaried officer. I am responsible for the day-to-day operation of the organization and I supervise the activities of

PVA's Legislative Department. During the course of my work, I regularly become aware of governmental actions and litigation that might affect the operation of PVA.

3. PVA was formed in 1946 by several groups of paralyzed veterans which convened in Chicago, Illinois. It was chartered by an Act of Congress on August 11, 1971.

4. PVA is exempt from federal income taxation under Section 501(c)(4) of the Internal Revenue Code of 1954, as amended, and the deductibility of contributions to it are governed by Section 170 of the Internal Revenue Code. I am attaching as Exhibit A to this affidavit a true copy of a letter, dated February 2, 1973, from the Internal Revenue Service to PVA, a copy of which letter is maintained under my custody and control in the PVA files in Bethesda, Maryland, and which determines PVA's tax exemption and tax deductibility.

5. To qualify for membership in PVA, an individual must be a veteran of the United States Armed Forces who has suffered spinal-cord injury or disease. At present, there are a total of approximately 12,000 members of PVA.

6. Through its National Legislative Department, PVA seeks to influence legislation to ensure and improve benefits to spinal-cord injured or diseased veterans and others similarly afflicted.

7. The total revenue of PVA for the fifteen months ending December 30, 1981, was approximately $11.5 million. Approximately $10.4 million of that total was derived from public contributions.

8. On March 26, 1982, I first learned of the existence of the litigation known as *Taxation With Representation of Washington v. Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc), the litigation in which the Veterans' Organizations seek to intervene.

9. To the best of my knowledge, no one else in PVA knew about the pendency of the *Taxation v. Regan* lawsuit before I learned about the decision.

/s/_____
R. JACK POWELL

Sworn to and subscribed before me this 23rd day of April, 1982.

/s/_____
NOTARY PUBLIC

My Commission Expires:
October 14, 1986

Appendix C.

United States District Court for the District of Columbia

TAXATION WITH REPRESENTATION OF WASHINGTON
2369 North Taylor Street
Arlington, Virginia 22207
(703) 527-2605

Plaintiff, CIVIL ACTION NO. 78-0834

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury,
JEROME KURTZ,
Commissioner of Internal Revenue,
and
THE UNITED STATES OF AMERICA,

Defendants.

May 10, 1978

COMPLAINT FOR DECLARATORY RELIEF

1. This is an action for declaratory judgment with respect to the initial tax exempt qualification of an organization described in section 501(c)(3) of the Internal Revenue Code ("the Code").

2. This Court has jurisdiction under 26 U.S.C. § 7428.

3. Plaintiff Taxation with Representation of Washington ("TWRW") is incorporated under the District of Columbia Non-Profit Corporation Act. Its principal office is located in Arlington, Virginia.

4. The defendants are W. Michael Blumenthal, Secretary of the Treasury, Jerome Kurtz, Commissioner of Internal Revenue, and the United States of America.

5. TWRW was formed on June 14, 1977, to absorb and carry forward the courtroom and legislative advocacy activities conducted by two other nonprofit organizations, Tax Analysts and Advocates ("TAA") and Taxation with Representation ("TWR").

6. TAA is classified by the Internal Revenue Service as a tax exempt charitable and educational group under section 501(c)(3) of the Code. It engages in public interest tax-related litigation and publishes a weekly journal on federal tax matters. TWR is classified by the Internal Revenue Service as a tax exempt social welfare organization under section 501(c)(4) of the Code. It is principally engaged in representing the interests of ordinary taxpayers at legislative and administrative hearings.

7. Both TAA and TWR are financed through public contributions. In addition, TAA (but not TWR) is partly supported by publication receipts and foundation grants.

8. Under current law, contributions to TAA for its courtroom advocacy work are tax deductible, but contributions to TWR for its legislative advocacy are not. In addition, foundations may support the courtroom advocacy of TAA, but may not, without penalty, support the legislative advocacy of TWR.

9. The Internal Revenue Service ("IRS"), an agency of defendant United States of America, has ruled that TWRW does not qualify for exempt status under section 501(c)(3) of the Code. The IRS has rejected TWRW's request for exempt status under section 501(c)(3) of the Code solely because of TWRW's stated purpose of attempting to influence legislation.

10. On June 27, 1977, TWRW filed with the IRS a completed application for recognition of exemption under section

501(c)(3) of the Code. On October 6, 1977, the IRS requested additional information to complete its consideration of the application. This information was timely furnished to the IRS on November 1, 1977. The IRS denied recognition of exemption under section 501(c)(3) of the Code on November 25, 1977.

11. On December 13, 1977, TWRW filed a timely protest of the IRS denial and requested a conference on the exemption application with the IRS. On January 10, 1978, a conference was held between Thomas F. Field of TWRW and Edward K. Karcher of the Exempt Organizations Division of the IRS.

12. On February 14, 1978, the IRS issued a final adverse ruling denying TWRW exempt status under section 501(c)(3) of the Code.

13. TWRW has exhausted its administrative remedies.

14. If TWRW were exempt from federal income taxation under section 501(c)(3) of the Code, it would be eligible to receive contributions which would be tax-deductible to donors under sections 170(c)(2), 2055(a)(2), 2106(a)(2) and 2522 of the Code. Based on the experience of TAA and TWR, this means that individual contributions would be approximately 23 percent greater than otherwise. In addition, private foundations would be entitled to provide funds for the general support of TWRW's activities without incurring tax liability under Code section 4945(d)(5) as a result of their contributions. In practice, foundations will not make grants to TWRW if there is any possibility of incurring section 4945 tax penalties. TWRW's efforts to raise funds to support its activities are thus severely hampered by the IRS denial of section 501(c)(3) status.

15. TWRW would qualify for section 501(c)(3) status except for its stated purpose of attempting to influence legislation.

16. The denial of section 501(c)(3) status to TWRW on the ground that it may engage in substantial attempts to influence legislation is unconstitutional in the following respects:

(a) the restrictions on substantial attempts to influence legislation unconstitutionally abridge the freedoms of speech, association, and press, and the right of petition of TWRW and its members by conditioning the benefits of eligibility under section 501(c)(3) upon the surrender of such First Amendment rights and freedoms;

(b) the restrictions on substantial attempts to influence legislation deny TWRW and its members the equal protection of the laws, as guaranteed by the due process clause of the Fifth Amendment, since organizations which are similarly situated in relevant respects are, without regard to whatever attempts they make to influence legislation, granted tax benefits while comparable benefits are denied to TWRW;

(c) the restrictions on substantial attempts to influence legislation contained in section 501(c)(3) are unconstitutional on the ground of vagueness since they lack the specificity required where a statute touches upon the exercise of First Amendment freedoms.

WHEREFORE, plaintiff prays that the Court declare (1) that defendants' denial of exempt status to plaintiff is improper since the denial is based on a statutory restriction which is unconstitutional, (2) declare that plaintiff is entitled to exempt

status under section 501(c)(3) of the Code, and (3) grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/_____

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Attorneys for Plaintiff

May 10, 1978

Appendix D.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464 **September Term, 1981**

TAXATION WITH REPRESENTATION OF WASHINGTON,
APPELLANT

v.

DONALD T. REGAN,
Secretary of Treasury, et al.

CIVIL ACTION NO. 78-0834

Received
United States Court
of Appeals for the
District of Columbia Circuit
May 27, 1982
GEORGE A. FISHER
CLERK

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene, the motion of American Legion to intervene and for expeditious determination of this motion, the motion and corrected motion of Veterans of Foreign Wars of the United States for leave to intervene, appellees' (federal) opposition to motions for intervention, and the replies of Disabled American Veterans and Paralyzed Veterans of America and American Legion to the aforesaid opposition, it is

ORDERED, by the Court, that the aforesaid motions to intervene are denied and the Clerk is directed to note the docket accordingly.

Per Curiam

FOR THE COURT:

/s/_____
GEORGE A. FISHER
Clerk